Supreme Court, U. S.
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IN THE

Supreme Court of the United States

DOCKET NO. 78-1429

ANTHONY COSTANZO,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF FOR PETITIONER

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United States v. Caceres,
No. 76-1309 (April 2, 1979) 5

CODE CITED:

United States Code, Title 5, §552a 1

STATEMENT

During the trial of this case the following demands for disclosure were made with the following results and prejudice.

A demand was made for Special Agent Jumonville's time records, which would have revealed the extent to which Jumonville devoted his time to the Petitioner's case, and the frequency and extent of Petitioner's cooperation (A272-273.290). They were neither produced nor accounted for.

A demand was made for the tapes which Petitioner provided to Jumonville, clearly relevant to the central issue in the case, whether Petitioner was providing information on Kelly continuously (A281-282, 513-514). Although Jumonville admitted receiving these tapes (A108), they were neither produced nor accounted for.

Investigative files which the Government conceded would contain information supplied by Petitioner (A778-779) were never produced.

Receipts for the tape supplied by Petitioner, which were supposed to be in the file which was maintained upon Petitioner as an informant and which would reflect to which investigative files the tapes were forwarded—and thus the extent and areas of Petitioner's cooperation—(A295) was neither produced nor accounted for.

When Petitioner was discovered taping his conversation with Jumonville and Peter Sarasohn, Assistant to the United States Attorney, the recording was obliterated by Jumonville at the suggestion of Sarasohn (A865). This process, however, produced a recording of the continuation of the meeting between Petitioner, Jumonville and

Sarasohn which Sarasohn then kept (A865-866). Although Jumonville had been able to listen to this tape before testifying as to that conversation (A269), the copy of this tape given to Petitioner could not be played on any machine (A241).

There was evidence that Patrick Kelly had provided Jumonville with three tapes of conversations relevant to the case. Apparently Jumonville did not recall receiving them (A106). They were never produced, and the trial court made no determination of whether there had been such tapes, what if anything became of them, nor take any other steps to determine whether Petitioner's rights under Brady or the Jencks Act had been violated.

Kelly, moreover, provided Jumonville with tapes concerning other investigations of alleged crimes in which he was involved (A214). When the issue of Kelly's relationship with Petitioner arose, Kelly testified that almost all the deals they had together were unlawful. Some of these allegations were discussed in detail as "other crime evidence" (A225-236). Petitioner denied that those other deals were unlawful (A548-559), except for those which he reported to the F.B.I. (A514). Tapes concerning these other "deals" were not produced. The informant's file maintained on Kelly, and the 302's prepared by Jumonville as a result of his conversations with Kelly were not produced.

ARGUMENT

This Court is not asked merely to grant appellate review of trial court fact finding on a new trial motion, even though the standard of review is involved. The Government's response does not squarely meet the issue. This is not merely a case where false evidence crept in. It is a major exposure of a Byzantine structure of the Government designed to control evidence so that informants/witnesses can be disciplined through the Judicial Branch and the activities of Government agents can be sanitized. The Court is asked to set ground rules on the preservation and disclosure of evidence in light of a clear, recent Congressional command so that the real trial takes place in a courtroom, not in the basement of the police station.

The false testimony was not merely of a witness. It was by an F.B.I. Special Agent, more particularly the Petitioner's "handler." It is the tip of the iceberg. The inaccurate April 5th report is part of the manipulated records structure designed to enforce discipline summarily and effectuate control through the courts.[1] Far from not making a legal claim (Gov't 7n.4) the Petitioner claimed at trial that the obliterated tape was made because he felt the government was not keeping its agreements, thus subjecting him unfairly to jeopardy and the tape was destroyed against his will. Former Assistant U.S. Attorney Sarasohn concedes that obliteration was his own idea and was carried out by Special Agent Jumonville (A865). If the tape was prejudicial to Petitioner, why destroy it

1. Records in an F.B.I. informant's file are, according to Government witnesses, used by F.B.I. agents to evaluate an informant's performance (A294-295). They are also used by the Government's attorneys in determining what dispositions of an informant/defendant's case to recommend (A1024-1025).

rather than use it as additional leverage to revive Petitioner's flagging cooperation or present it in Court as other tapes were presented? Why suppress evidence of a crime? On the other hand if, as Petitioner testified, the tape would have revealed bad faith on the Government's part, its destruction materially deprived Petitioner of a fair trial. Either way, the tape was valuable.

This brings up the Jencks Act. There is no doctrine of the white heart and the empty head. The Government regards the Jencks Act as a flag of convenience, and this Court must decide whether the Jencks Act is to be so emasculated.

In *United States v. Caceres*, No. 76-1309 (April 2, 1979) this Court re-affirmed the oft-repeated principle that agency regulations will be enforced to effectuate Congressional or Constitutional policies. The aim, always, is to favor the disclosure of relevant, probative evidence. In this corollary case to *Caceres*, are the required F.B.I. records flags of convenience or should they and the Freedom of Information Act completeness and record-keeping requirements[2] require that documentation

2. The Justice Department maintains a system of records on persons referred to in potential or actual cases and matters of concern to the General Crimes Section, Criminal Division, and correspondents on subjects directed or referred to the Criminal Division. See Justice/CRM-004, 42 F.R. 12765 (1977). It also maintains Justice/CRM-006, Information File on individuals and commercial entities known or suspected of being involved in fraudulent activities. 42 F.R. 12767 (1977). It also maintains Justice CRM-010 Organized Crime and Racketeering Information System. 42 F.R. 12769 (1977). There also exists Justice/CRM-022 Witness Immunity Records, which covers potential or actual witnesses for whom immunity is proposed. 42 F.R. 12778 (1977). The Federal Bureau of Investigation maintains an F.B.I. Central Records System, Justice/F.B.I.-002, which covers individuals who relate in any manner to offiicial F.B.I. investigations including, but not limited to suspects, victims, witnesses, and close relatives and associates that are relevant to an investigation. 42 F.R. 12809 (1977). Included within that system are such filing classifications as:

29. Bank Fraud and Embezzlement

be reliable rather than self-serving and should these standards be enforced by the Jencks Act, *United States v. Agurs*, 427 U.S. 97 (1976) and *Giglio v. United States*, 405 U.S. 150 (1972). This case is a lamentable catalog of information undisclosed after specific request. Contrary to the Government's position, *Agurs* is not limited to post trial discoveries. It also specifies perjury and demands for identified material, some of which was identified by the F.B.I. at trial but was never disclosed pursuant to demands.

The basic reason invoking this Court's jurisdiction remains: The relationship of Petitioner as a Government confidential informant is conceded and that relationship was continuing when the very crimes charged were supposed to have been committed.

Are existing judicial mechanisms adequate to ensure that information will be reliably kept and accurately disclosed? Is the remedy to be as the Government suggests, a naive assumption that the interaction between agents and their alter-ego cooperating captives can be judicially policed by new trial standards "generally" used for recanting witnesses? The suggestion brushes off the seriousness attached to misconduct by the Government underlying this Court's decision in *Giglio*. This is not a recanting witness "generally." It is a fundamental conflict between representatives of an enforcement agency and their operatives where the Government keeps the records and the

48. Postal Violations

87. Interstate Transportation of Stolen Property (Fraud by Wire, Radio, or Television)

137. Criminal Informants

166. Interstate Transportation in Aid of Racketeering.

183. Racketeer Influenced and Corrupt Organizations 42 F.R. 21668-21669 (1977)

courts are expected to mete out discipline at the Government's request.

With full awareness of the awesome power of information, Congress decided that record-keeping by Government agencies was not adequate to protect subjects of those dossiers. This case is confirmation of Congressional judgment. It is a case of Government adherence to the old ways and an opportunity for this Court to point to the new direction. This Court should grant certiorari and declare that Jencks Act disclosure should be at least as adequate as the requirement of record-keeping under the Freedom of Information Act and Agency regulations. Inadequate disclosure should be sanctioned as in *Giglio* and *Agurs*.

In the labyrinthine ways of the informant/cooperating witness system, new trial tests "generally" adequate should not suffice. Prejudice to the very ability to assert a defense is the only test that will with certainty ensure independence of the Judicial process.